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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

S. R. WITKOWSKI, WARDEN; STATE OF SOUTH CAROLINA; ATTORNEY GENERAL OF SOUTH CAROLINA,

Petitioners,

vs

LEWIS D. GOLDSMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. May the Court of Appeals create an intolerable conflict and alter the mandates of Wright v. West, 112 S.Ct. 2482 (1992), and Jackson v. Virginia, 443 U.S. 307 (1979), when it requires the prosecution to negate all other hypothesis rather than viewing the evidence in the light most favorable to the state in collateral review?

II. In determining whether to grant a writ of habeas corpus to a state prisoner can a federal court fail to give any deference to the state court's application law to specific facts and review a state court determination de novo?

III. Is Due Process denied when the state trial judge makes a curative instruction to disregard hearsay testimony where the stricken testimony when there was no likelihood that the jury would not

follow the curative instruction and the evidence added little to the prosecution's case?

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The Attorney General of South Carolina, through below-signed counsel, on behalf of the named Petitioners hereby petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment in which the court reversed the order of the District Court for the District of South Carolina and remanded the case for entry

of an order granting the writ of habeas corpus to South Carolina inmate, Lewis Goldsmith.

CITATION TO OPINIONS BELOW

The opinion of. the Court of Appeals for the Fourth Circuit reversing the district court's denial of habeas corpus relief is reported as Goldsmith v. Witkowski, et al., 981 F.2d 697 (4th Cir. 1993), and is reprinted as Appendix A to the Petition. The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc is unreported and reprinted as Appendix B. The opinion of the Supreme Court of South Carolina is reported as State v. Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided the matter on November 24, 1992, and amended its decision on January 5, 1993. A timely

petition for rehearing and suggestion for rehearing in banc was denied on January 7, 1993.

This matter arises from a petition for a writ of habeas corpus by a state prisoner brought pursuant to 28 U.S.C. Section 2254. The Court of Appeals had jurisdiction to review the decision of the District Court under 28 U.S.C. Section 1291 and Section 2253.

The Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Due Process Clause of the Fourteenth Amendment to the United States Constitution which states: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution which states, in its pertinent part: "In all criminal

prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

3. S.C. CODE ANN. Section 44-53-370 (1985 Cum. Supp.) which states in its pertinent part:

> (a) [I]t shall be unlawful for any person:
>
> > (1) to manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.
> >
> > ....
>
> (d) ...
>
> > (3) Possession of more than ten grains of cocaine, ... twenty-eight grams or one ounce of marijuana ... shall be prima facie evidence of a violation of subsection (a) of this section ....

4. S.C. CODE ANN. Section 16-17-410 in its pertinent part states "the crime known to the common law as 'conspiracy' is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful

object or an object neither criminal nor unlawful by criminal or unlawful means."

STATEMENT OF THE CASE

The Attorney General of South Carolina on behalf of the named Petitioners makes this Petition for Writ of Certiorari to ask this Court to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit which reversed the District Court and rejected the South Carolina Supreme Court's conclusions of law and findings of fact. We submit that the state court and district court properly applied the federal constitutional analysis in a collateral proceeding in holding that (1) there was constitutionally sufficient evidence to support the state trial jury convictions of possession with intent to distribute and conspiracy to distribute cocaine and marijuana, and (2) that a deputy's hearsay testimony did not require a new trial where a cautionary instruction

was given and the objected evidence added little weight to the state's case. We respectfully submit that certiorari is appropriate and should lead to a reversal of the opinion of the Fourth Circuit and affirmance of the Order of the United States District Court.

a. Procedural History.

The Petitioner, Lewis D. Goldsmith, #117479, is currently confined in the Cross Anchor Correctional Institution pursuant to orders of commitment from the Clerk of Court for Greenville County, South Carolina. The Petitioner was indicted at the October, 1988, term of the Greenville County Court of General Sessions for the offenses of possession with the intent to distribute marijuana, simple possession of marijuana, possession with the intent to distribute cocaine and simple possession of cocaine. He was also indicted for two counts of conspiracy. He proceeded to trial before the Honorable

James E. Moore, Presiding Judge, and a jury on December 12, 1988. In the trial court the Petitioner was represented by court-appointed counsel, C. Carlyle Steele, Esquire. The State was represented by Symnes Culbertson, Assistant Solicitor for the Thirteenth Judicial Circuit.

The Petitioner was found guilty as charged on all counts and was subsequently sentenced by the state court to four (4) years for possession of marijuana, twenty (20) years and a twenty thousand dollar ($20,000) fine for possession of marijuana with the intent to distribute, four (4) years for possession of cocaine, twenty (20) years and a fifty thousand dollar ($50,000) fine for possession of cocaine with the intent to distribute, ten (10) years for conspiracy to distribute marijuana, and ten (10) years for conspiracy to distribute cocaine. Said sentences are to be served concurrently.

The Petitioner served opposing counsel with timely Notice of Intent to Appeal said conviction and sentence on December 22, 1988. In the appeal, the Petitioner was represented by Tara Shurling of the South Carolina Office of Appellate Defense. In the appeal, the following exceptions were presented:

> I. The lower court erred, and thereby violated the Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina State Constitution, by denying the Appellant's motion for a mistrial subsequent to the improper introduction of hearsay testimony from a state witness where the receipt of this information into evidence clearly violated the Appellant's right to confront witnesses against him inasmuch as the source of the information did not testify.
>
> II. The lower court erred, and thereby violated the Appellant's rights to due process of law as protected by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 3, of the South Carolina Constitution, by denying Appellant's motions for directed verdicts of acquittal on all charges against him where the evidence as presented by the state when

viewed in the light most favorable to the prosecution was insufficient to establish the Appellant's guilt of every element of the crimes charged beyond a reasonable doubt.

III. The lower court erred, and thereby violated the Appellant's rights to due process of law, as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 3, of the South Carolina Constitution, by entering judgment against the Appellant for both simple possession of marijuana and cocaine and the greater offenses of possession with the intent to distribute marijuana and cocaine, and in subsequently sentencing the Appellant to separate terms of incarceration for each of these offenses, where the Appellant's double prosecution and punishment for these offenses constituted a violation of his rights against being placed in double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 12, of the South Carolina Constitution.

(Tr. pp. 81-82). In the Brief of Appellant, filed on July 13, 1989, counsel for the Petitioner raised an issue as to each exception. On June 18, 1990, the Supreme Court of South Carolina entered its opinion affirming the convictions for possession with intent to distribute and

conspiracy to distribute both cocaine and marijuana, but vacated the convictions for simple possession of cocaine and marijuana as lesser included offenses. State v. Goldsmith, 301 S.C. 463, 392 S.E.2d 787 (1990). (J.A. pp. 89-91).

Goldsmith next filed a Petition for a Writ of Habeas Corpus in the District Court. In the Petition, he raised the following pertinent issues:

> A. Whether the lower court erred when it denied motion for mistrial.
>
> > 1. The state's witness intentionally made a statement that they had information that the Petitioner and co-defendant would be at the apartment at the time of the raid, counsel objected, and made a motion for a mistrial and that motion was overruled by the court, Petitioner contends that the curative charge did not save the prejudicial testimony from falling to a level of hearsay and becoming inadmissible testimony, and did prejudice the Petitioner to a point that it foreclosed the Petitioner from receiving a fair trial.
>
> B. Whether or not the state proved every element of the offenses that

the Petitioner was charged with beyond a reasonable doubt.

> 1. The state failed to prove that the Petitioner had any knowledge of the drugs that was found at another persons home, and in looking at the evidence in light most favorable to the state, there was not evidence that would allow the state to find the Petitioner guilty beyond a reasonable doubt.

(J.A. pp. 95-96). The Respondents made their Return asserting that neither ground established a valid claim for relief. (J.A. pp. 103-109). On January 18, 1991, the Honorable William M. Catoe, United States Magistrate Judge, entered a presumption of correctness to the state court findings of historical fact in which it concurred. (J.A. pp. 120-123). The Petitioner objected. (J.A. p. 125). The District Court concurred in the Report and dismissed the Petition. (J.A. pp. 126-127).

The Respondent appealed the denial of the writ to the United States Court of Appeals for the Fourth Circuit. In his

opinion, the panel decision, over the dissent of Circuit Judge Niemeyer, ordered that the writ of habeas corpus be granted on the basis of insufficient evidence to convict him of conspiracy and possession with intent to distribute marijuana and cocaine despite the majority's conclusion that Goldsmith was "alone in the apartment, except for the presence of a small child" and he was "sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered," which imputed knowledge of the drugs to Goldsmith. The majority, however, reached the conclusion that he lacked "dominion and control over the drugs." 981 F.2d 701-702. Similarly, the court concluded that there was no evidence of a conspiracy. 981 F.2d at 702-703. Finally, the majority concluded that even though the trial court sustained no objection to hearsay testimony and timely

instructed the jury to disregard the answer, the error was not harmless. 981 F.2d 703-704. A petition for rehearing and suggestion for rehearing in banc was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The opinion of the Fourth Circuit creates an intolerable conflict with this Court's decisions in Jackson v. Virginia, 443 U.S. 307 (1979), and Wright v. West, U.S. , 112 S.Ct. 2482 (1992).

In the proceedings in the lower court, the court was addressing the sufficiency of the evidence to convict in a conspiracy and possession with intent to distribute illegal drugs. Without giving any deference to the state appellate court's factual resolution of the issue of possession, the Court of Appeals required the state to negate all other inferences to be drawn from the evidence rather than having "all the evidence is to be

considered in the light most favorable to the prosecution." Wright v. West, 112 S.Ct. at 2492; Jackson, 443 U.S. at 319. As the factual record before this Court reveals, in drug prosecutions it is not unusual for the evidence to suggest other hypothesis than guilt. To suggest, as the opinion of the Court of appeals obviously does that the prosecution in collateral review must affirmatively reject those hypothesis would create havoc among sufficiency review in habeas cases which Jackson and Wright was intended to eliminate. This problem is likely to recur in the lower courts because of the further conflict between the state court decision in State v. Goldsmith, supra, and the panel decision of the Fourth Circuit as it relates to the fundamental issue of the existence of "constructive possession" in illegal drug prosecutions. In South Carolina alone, the calendar year of 1991 revealed 5,535 convictions. S.C. Office

of the Attorney General, Annual Report 1991, p. 160. The obvious fact that Goldsmith will be treated as binding precedent in the states of the Fourth Circuit would lead to a total lack of finality in these types of cases where the Court of appeals "shut his eyes" entirely to the state court application of law to fact.

The Petitioners recognize that this Court does not generally grant certiorari to review evidence and discuss specific facts. U.S. v. Johnson, 268 U.S. 220 (1925). However, certiorari is appropriate "where the standard appears to have been misapprehended or grossly misapplied." Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974). This is such a case.

In Wright v. West, 112 S.Ct. at 2492-3, the court clearly set forth the standard for evidentiary sufficiency it utilized:

> In Jackson, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "all of the evidence is to be considered in the light most favorable to the prosecution," 443 U.S. at 319, 99 S.Ct. at 2789 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," id., at 326, 99 S.Ct. at 2792; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution," ibid. Under these standards, we think it clear that the trial record contained sufficient evidence to support West's conviction.

PURPOSE

This Petition is made because the proceeding involves a question of exceptional importance in the relationship of comity and federalism in habeas corpus actions involving sufficiency of evidence challenges to state convictions, particularly in drug convictions. The majority opinion clearly reveals that the

decision is in intolerable conflict with the decision Wright v. West, supra, and Jackson, supra. Rather than viewing the evidence in the light most favorable to the prosecution and resolving inferences in favor of the prosecution, the panel decision construed the "logical" inference in favor of the state on the issue of "constructive possession" only when there were no other inferences which could be drawn from the same set of facts. This is particularly revealing in the language of the Court of Appeals in addition to the fact that one of the alleged inferences the Court of Appeals assumed negated the guilt of Goldsmith when, in fact, made the defendant criminally culpable.

A. Convictions for possession with intent to distribute drugs.

In concluding that the fact that the evidence revealed that only the defendant was in an apartment sitting at a dining room table laden with narcotics and drug

paraphernalia that adequately imputed knowledge of the illegal drugs, the Court of Appeals reached an unreasonable hypothesis on the basis of this wealth of actual knowledge that the only individual proven to have "knowledge" of the particular drugs on the table and the ability to touch the drugs at the time in question (Goldsmith) lacked "dominion and control or the right to exercise dominion and control over the drugs" as a matter of state law. In making that determination, the panel pointed out the alleged deficiencies in the state's case as being:

> 1. The state did not identify the lessor or lessee of the apartment.
>
> 2. It did not identify the small child who was in the apartment, or the relation between the child and any of the defendants.
>
> 3. It failed to establish any connection among Goldsmith and his two co-defendants or between the co-defendants.
>
> 4. No witness was able to say, however, who was in the apartment before the apartment or why Goldsmith was there (despite the obvious fact

that Goldsmith was the only person in the apartment before the police sought entry).

5. There was no evidence that all entrances to the apartment were under observation.

6. Both Cooper and Jordan were close to the building and Goldsmith may have been waiting for either co-defendant, or both, to return from outside.

7. The evidence did not reveal whether Goldsmith had been at the apartment on previous occasions or how he came to be there when he was arrested.

8. Goldsmith did not attempt to hide or dispose of the drugs or to evade the police.

Goldsmith, 981 F.2d at 702. In concluding the evidence was insufficient, the Court of Appeals, in a habeas setting, concluded that the evidence did not demonstrate that Goldsmith was "alone" in the sense he would allow the jury to infer he had the right to exercise dominion and control of the apartment or the contents of the apartment. The dissenting opinion of Judge Niemeyer correctly stated the only question properly before this Court based

upon the Petition for Writ of Habeas Corpus was the question of the defendant's actual knowledge of the drugs, not whether he possessed adequate dominion and control under state law to prove constructive possession. Id. at 704-706. This Court must limit its review in a habeas setting as to the issue of constitutional sufficiency and must resist any temptation to substitute the Court's interpretation of the evidence for that of a South Carolina jury. See Wright v. West, 112 S.Ct. 2482, 2492 (1992). In Stamper v. Muncie, 944 F.2d 170 (4th Cir. 1991), the Court stated that:

> Because one or more other, non-incriminating inferences might be drawn, Stamper contends it was unreasonable of the jury to accept the inferences suggested by the prosecution. He goes so far as to suggest that an inference may only qualify as a "logical" inference when no other inferences fairly may be drawn from the same set of facts. But in Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court ruled the prosecution is not required to negate every hypothesis except that of guilt.

944 F.2d at 175. For the appropriate inferences factually summarized in the dissenting opinion at 981 F.2d at 704-706, it is clear that the only people in Cooper's apartment immediately before the search were Goldsmith and a small child. At the time of the search, Goldsmith was found sitting at the kitchen table. In front of him on the table were cocaine powder, drug paraphernalia, rolling papers, and a tube straw. On the floor, right beside him, were two bags of marijuana. In addition to the drugs found in front of the defendant, the police seized additional cocaine and marijuana, aluminum foil packages with cocaine in them, scales, a plastic cup with marijuana seeds, a hand gun and cash. Upon arresting Goldsmith, officers discovered he had $200 in cash hidden in his sock.

It is clear that "proximity" under certain circumstances may be adequate to constitute constructive possession of a

drug. United States v. James, 764 F.2d 885 (D.C. Circuit 1985); also United States v. Brooks, 940 F.2d 598, 600 (10th Cir. 1991). Here, the circumstantial evidence, as properly analyzed by the state court, adequately proved under the Jackson standard that the defendant's knowledge of the drugs and paraphernalia on the laden table in an apartment in which he at the time the drugs were laden were under his sole control adequately satisfied constructive possession. State law is consistent with this conclusion. See State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Lane, 271 S.C. 68, 245 S.E.2d 114 (1978). The ability of the Petitioner to see these drugs in his plain view adequately inferred his actual knowledge of the cocaine and marijuana in his immediate vicinity and available for his own view adequately satisfied the West-Jackson

standards. The panel decision requires state courts to negate all other hypotheses existing in the evidence for the state conviction to survive the Goldsmith analysis. Simply put, the Jackson standard requires more than merely resolving conflicts of evidence in favor of the state, it requires "that the prosecution need not affirmatively rule out every hypothesis except that of guilt, and that a reviewing court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Wright v. West, 112 S.Ct. at 2492. Under these standards, Petitioners submit that the trial record contains sufficient evidence to support Goldsmith's guilt as determined by the state court and

the district court and the dissent in the panel decision.

B. CONSPIRACY TO DISTRIBUTE DRUGS.

Similarly, the Court of Appeals failed to apply the Jackson standard as it related to the conspiracy conviction. In making its conclusion that the evidence was insufficient to prove conspiracy, the Court concluded no circumstantial evidence was shown after the existence of a conspiracy. Interestingly, the Court concluded that "it is true, as previously noted, that the jury could have inferred Goldsmith's knowledge of the drugs. A reasonable juror could have believed Goldsmith was "a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps an interloper." Goldsmith, 981 F.2d at 703. Despite the obvious that a "user waiting to make a purchase" of drugs clearly infers "a combination between two or more persons for the purpose of accomplishing a

criminal act ... , the definition of conspiracy in South Carolina, pursuant to S.C. CODE ANN. Section 16-17-410, the majority clearly reveals its inversion of the Jackson standard by requiring the state to again affirmatively rule out every hypothesis except that of guilt. As revealed in the dissent, "the jury could have properly concluded that Cooper was involved in a drug operation, a finding necessary to support a conspiracy conviction. When Cooper recognized that law enforcement officials had arrived at the scene, he ran to the apartment in an effort to exclude them and thereby protect the drug activity inside. From all the circumstantial evidence, a rational jury could, and did, conclude that Goldsmith was involved in the conspiracy." Clearly, the majority's complete failure to acknowledge the effect of the evidence of Cooper's actions on the conspiracy case

reveals that it did not properly apply the Wright-Jackson standard.

2. Certiorari is warranted because the Court of Appeals Opinion failed to give any deference to the Opinion of the Supreme Court of South Carolina application of law to facts.

The Petitioners request this Court to address the situation left unaddressed in West v. Wright, supra, as to whether the state appellate court's resolution of law to the facts is entitled to any deference in federal habeas corpus review. In the opinion of the Supreme Court of South Carolina in State v. Goldsmith, supra, the state concluded that the factual situation supported its conclusion that there was "constructive possession" of the controlled substances as a matter of substantive state law. (J.A. pp. 89-90). Here, the Court of appeals rejects that finding, concluding in its de novo review that there was not adequate evidence of

"dominion and control" despite the inalterable fact that Goldsmith was alone in the apartment within reach of a table strewn with cocaine and drug paraphernalia and bags of marijuana by his side.

Relying upon state law, State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987), the state court concluded:

> Viewing the evidence in the light most favorable to the State, it may be reasonably inferred appellant had actual knowledge of the .1 gram of cocaine in plain view on the table and the 113.4 grams of marijuana in plain view on the floor in his immediate vicinity. Possession of this contraband, including the paraphernalia also in plain view, is therefore imputed to appellant. State v. Kimbrell, supra. This evidence supports the submission of possession with intent to distribute marijuana and possession with intent to distribute cocaine to the jury. Matthews v. State, supra; State v. Adams, supra. Submission of the conspiracy charges was proper based on the evidence appellate was alone in another's residence with controlled substances and paraphernalia in his constructive possession when Cooper attempted to prevent the officers from entering the apartment. See State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (conspiracy may be shown by circumstantial evidence including the

> parties' conduct). We conclude the trial judge properly denied the motion for directed verdict on all counts.

State v. Goldsmith, 301 S.C. 466-467, 392 S.E.2d at 789.

The Court of Appeals disregarding these state law conclusions, instead chose on its own, to enter the state court factual foray and resolved there was no evidence of dominion and control. The Court of Appeals took issue with the state court stating:

> The state court in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the Jackson standard.

Goldsmith, 981 F.2d at 701.

The problem with the analysis is that the state court, in concluding that Goldsmith's presence in the apartment and proximity in the drugs so obviously showed dominion and control over the items -- he was the sole person in the apartment

(except for a small child) and the drugs were physically within his reach and plain view [or obvious control]. To the converse, Goldsmith's dominion and control over the drugs, as determined by the state court proved his knowledge of the drugs. Under Jackson, this predicate is so obvious so as to need no restatement in the state court opinion. The Court of Appeals blatantly rejected this reasonable hypothesis and clearly by the opinion, in de novo review required the state to disprove other hypothesis before it would entitle it to accept the state court opinion. The problem is the factual circumstances in Goldsmith now define the substantive law of constructive possession in South Carolina -- the Court of Appeals has chosen to re-write South Carolina law and state that it is not. Habeas corpus review must entitle these discrete state court findings to "absolute respect." Kuhlmann v. Wilson, 477 U.S. 436, 446

(Opinion of Powell, J.). To do otherwise would preclude a state court from refining and defining its substantive state law. Here, these state court findings of constructive possession must be "presumed correct" and can be overcome only by "convincing evidence." 28 U.S.C. Section 2254(d). Clearly then, these conclusions of the state court (which defined the law of constructive possession) must be viewed with deference. As stated before, a habeas judge need not -- and indeed may not -- shut his eyes" entirely to state court applications of law to fact. Brown v. Allen, 344 U.S. 443, 508 (1953) (Opinion of Frankfurter, J.). To the extent that the question of deference left unresolved in Wright v. West, supra, and Brown v. Allen, supra, remain, this case presents a fitting situation ripe for its reconsideration.

3. Certiorari is also appropriate to consider whether the curative

instruction was adequate to cure the effect of hearsay testimony.

In its opinion, the Court of Appeals cast aside the state court conclusion of the objected evidence as "the resulting prejudice was not of such a magnitude as to affect the outcome of the trial in light of the competent evidence discussed above," 301 S.C. at 467, 392 S.E.2d at 789, and instead created an aura of misconduct asserting that the entirety of the convictions rested upon the objected statement "we had information that Mr. Goldsmith and Mr. Cooper would be present at the time." Goldsmith, 981 F.2d at 703. Clearly, the mandates of harmless error review set forth in Greer v. Miller, 483 U.S. 756 (1987), were not carried out because the actual evidence before the trial jury actually revealed (1) that Goldsmith was present and (2) that Cooper was at the scene also. (J.A. pp. 9-15). The jury did not gain anything from the

brief comment and the prosecution sought nothing from it, except to unartfully explain why law enforcement was present to serve the warrant at that time. Clearly, it had no effect on the convictions. Particularly, it gave no effect to the curative instruction given by the trial judge to disregard the answer. Not only did the Court of Appeals disregard the trial court's instruction, it erroneously assumed that the jury did also. Jurors are assumed to have listened and followed the instructions. Boyde v. California, ___ U.S. ___, 108 L.Ed 2d 316 (1990). A review of this record suggests that the state trial and appellate court, as well as the federal district court was correct in its assessment of a lack of prejudice.

On appeal to the Supreme Court of South Carolina, the Court concluded that although it was improper for the prosecutor to pose such a question as to why they executed the search warrant, "the

resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the competent evidence." (J.A. p. 91). The District Court properly came to the same conclusion. (J.A. pp. 122-123, 126-127). The State submits that these conclusions were correct and Goldsmith is not entitled to federal habeas relief.

Deputy Tony Rogers of the Greenville County Sheriff's Department testified that he and other deputies proceeded to 192 Oakview Village Apartments in Greenville County to execute a search warrant at the residence. (J.A. pp. 20-21). During further direct examination, the following colloquy occurred:

> [Assistant Solicitor]: When you say that you executed the search warrant, does that mean that you had special duties?
>
> [Deputy Rogers]: That means that I go in, I actually serve the warrant, read it to the person in the residence, or in charge of the residence. Then I sit at a table, if we can find

> one convenient, and try to watch the suspects if there are any present, and I also log the items that are seized on to the inventory section of the search as they are brought to me by the other officers.
>
> [Assistant Solicitor]: I want to ask you why did y'all serve the search warrant that day?
>
> [Deputy Rogers]: We had information that Mr. Goldsmith and Mr. Cooper would both be present at the time.
>
> [Defense Counsel]: If Your Honor please, I would ask that that be stricken and the jury be instructed to disregard that. It is hearsay and inadmissible under any exception to the hearsay rule.
>
> The Court: Yes, sir, sustained, and the jury is instructed to disregard that answer.

(Emphasis added). (J.A. p. 22, l. 22 - p. 23, l. 15). Outside the presence of the jury, defense counsel moved for a mistrial on the grounds that the challenged testimony was prejudicial and its effect could not be cured. (J.A. p. 24). The trial judge denied the motion for a mistrial. (J.A. p. 25).

The Supreme Court of South Carolina rejected the claim in the direct appeal. The state court concluded:

> An instruction to disregard incompetent evidence is usually deemed to have cured any prejudice in its admission. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). Although it was improper for the solicitor to pose such a question, the resulting prejudice was not of such a magnitude as to effect the outcome of the trial in light of the competent evidence discussed above. See State v. Dawkins, supra.

In Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102, 3109, n. 8 (1987), the United States Supreme Court in a habeas proceeding stated that "we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, Richardson v. Marsh, 107 S.Ct. 1702

(1987), and a strong likelihood that the evidence would be "devastating to the defendant, Bruton v. U.S., 391 U.S. 123 (1968)." Here, the brief remark of Deputy Rogers to explain the course of the investigation, Winburn v. Minnesota Mutual Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973), was neither "devastating" nor of the type of comment that would create a probability that the jury would be unable to follow the instructions.

The Court of Appeals sought to leisurely mischaracterize the objected evidence as evidence that the police possessed information tying Goldsmith to an ongoing drug conspiracy which was not revealed. First, the stricken testimony was merely that they executed the warrant at that time because they thought Goldsmith, and Cooper would be at the apartment. There was no stricken hearsay testimony about Goldsmith and drugs, only that he might be present -- a fact

subsequently proven. It should be noted that earlier unobjected testimony about the earlier controlled buy that led to the search warrant was introduced. (J.A. pp. 7-8). Here, the brief remark did not have the implications or effect Goldsmith now seeks to place upon it. The trial judge's remark in striking the testimony eliminated the limited possibility of such impression which could have also innocently been that warrants are only served when someone is home.

Here, the evidence was not of such magnitude to be "devastating" or that the jury would have been unable to follow the instruction to disregard. Greer, supra. U.S. v. Cardenas, 778 F.2d 1127 (5th Cir. 1985) (possible prejudice of questions concerning a witness's prior drug arrests cured by instructions). U.S. v. Osatz, 912 F.2d 534 (2nd Cir. 1990). The evidence of guilt was far from being "weak" as the Court of Appeals suggests

for the reasons set forth in the first argument, as the dissent properly.

CONCLUSION

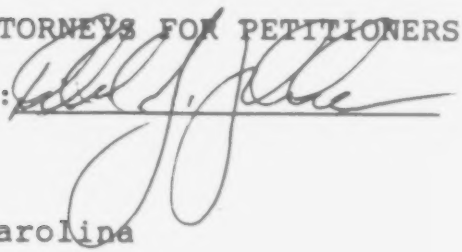
For each of the foregoing reasons and questions presented, we respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR PETITIONERS

By: 

April 6, 1993

Columbia, South Carolina

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lewis D. Goldsmith,

Petitioner-Appellant,

v.

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents-Appellees.

No. 91-7578

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Senior District Judge. (CA-90-1852-6-K)

Argued: May 7, 1992

Decided: November 24, 1992

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Reversed and remanded by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Murnaghan joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Steven H. Goldblatt, Director, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Donald John

Zelenka, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees. ON BRIEF: Eric J. Glassman, Student Counsel, Philip W. Owens, Student Counsel, Appellate Litigation Clinical Program, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. T. Travis Medlock, Attorney General, Columbia, South Carolina, for Appellees.

OPINION

SPROUSE, Senior Circuit Judge:

Lewis D. Goldsmith appeals from the district court's dismissal of his 28 U.S.C. Section 2254 petition for habeas corpus. In the district court, Goldsmith challenged convictions by a South Carolina state court for possession of narcotics with intent to distribute and conspiracy to distribute narcotics. We hold that the evidence was constitutionally insufficient to support the convictions, and that part of the State's evidence presented at trial violated Goldsmith's Sixth Amendment right to confront witnesses. Accordingly, we reverse.

Police in Greenville County, South Carolina, arrested Goldsmith and co-defen-

dants Timmy Cooper and Adele Jordan on drug charges in 1988. Goldsmith was indicted on six counts and was tried separately from his co-defendants; a state court jury found him guilty on all charges. He received concurrent sentences of four years for possession of marijuana, twenty years and a $20,000 fine for possession of marijuana with intent to distribute, ten years for conspiracy to distribute marijuana, four years for possession of cocaine, twenty years and a $50,000 fine for possession of cocaine with intent to distribute, and ten years for conspiracy to distribute cocaine. On appeal the South Carolina Supreme Court affirmed the convictions for possession with intent to distribute and conspiracy to distribute marijuana and cocaine, but vacated the two simple possession convictions as lesser included offenses. Goldsmith's petition for habeas corpus relief in the district court challenged the remaining four convictions. He

contended that, under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the evidence presented at trial was insufficient to sustain the convictions, and that the elicitation of hearsay testimony from a police officer violated his Sixth Amendment right to confront witnesses. The district court dismissed his petition, and he appeals.

To assess Goldsmith's challenge, we review the evidence produced at trial "in light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. The trial evidence consisted of both physical evidence and uncontested testimony from the five police officers who searched the apartment where Goldsmith was arrested. It demonstrated that on July 22, 1988, five narcotics deputies of the Greenville County Sheriff's Department searched an apartment in Taylors, South Carolina. The officers made the search pursuant to a valid warrant.

Two officers approached the apartment building from the front and three from the rear. The former testified that Goldsmith's co-defendant Timmy Cooper was outside when they arrived. Upon seeing the police, Cooper ran into the apartment through the front door. The three officers assigned to the rear of the building entered the apartment through the back door after overcoming Cooper's attempt to bar their entry.

The first officer into the apartment testified that as he entered, Goldsmith was sitting at a dinning room table. A small child was sitting on a sofa. The second officer into the apartment testified that as he entered, Goldsmith was standing next to the table and was "looking toward us to see what was going on as I went through the door." They subsequently arrested Goldsmith, Cooper, and Jordan. A body search pursuant to Goldsmith's arrest

uncovered $200 in his sock. No drugs were found on his person.

Both narcotics and drug paraphernalia were seized. From the dinning room table, the officers seized a tenth of a gram of cocaine (1.54 grains), a scale, a straw, and rolling papers. Two bags of marijuana were recovered near one of the table legs. The larger of the two bags was concealed in a shopping bag and contained 310.92 grams of marijuana; the smaller bag contained 113.4 grams. More evidence was found in a closed kitchen cabinet, the freezer, and the master bedroom. Officers seized cocaine wrapped in aluminum foil, a bag containing cocaine, a scale, a revolver, a covered plastic coffee cup containing marijuana seeds, a small bag of marijuana, and a lunch box containing plastic sandwich bags with the corners cut out.

Both the cocaine and the marijuana were in Goldsmith's plain view. The officers

testified that the one-tenth of a gram of cocaine on the dining room table was in Goldsmith's plain sight as the search began. One testified that the larger bag of marijuana was in a shopping bag on the floor, but that Goldsmith could not have avoided seeing the smaller bag from where he was standing.[1]

At trial, the officers testified that the apartment was not Goldsmith's residence; they did not identify who owned or rented the apartment. None of the officers could say that at the time they arrived at the apartment building Goldsmith was in the apartment. One testified, "I presume he was inside, we didn't see him outside."

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[1]Another officer testified that both bags of marijuana were in the shopping bag on the floor and were therefore not in plain view, although they were within Goldsmith's reach. Because *Jackson* requires us to review the evidence in the light most favorable to the prosecution, we accept the testimony that the smaller bag of marijuana was in Goldsmith's plain view.

Another, when asked who was in the residence when the police arrived, answered, "I can't say, I mean, when I got there."

A

Looking first the evidence to determine if it is sufficient to uphold Goldsmith's two convictions for possession with intent to distribute cocaine and marijuana, we view it "in the light most favorable to the prosecution," and consider whether "*any* rational trier of fact could have found the essential elements of that crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Under South Carolina Law, a conviction for the crime of possession with the intent to distribute, of course, requires proof of possession of drugs, and either actual or constructive possession is sufficient. S.C. Code Ann. § 44-53-370(a)(1); *State v. Ellis*, 207 S.E.2d 408, 413 (S.C. 1974). Because Goldsmith did not have actual possession of

the drugs in the apartment, proof of his constructive possession was required. A person has constructive possession of drugs if he has knowledge of the presence of the drugs and dominion and control, or the right to exercise dominion and control, over the drugs. *Ellis*, 107 S.E.2d at 413; *see also, State v. Kimbrell*, 362 S.E.2d 630, 631 (S.C. 1987) (holding that the possession element of the crime of trafficking in cocaine requires proof of power and intent to control). Constructive possession may be established by circumstantial evidence. *Ellis*, 107 S.E.2d at 413.

The South Carolina Supreme Court, in concluding that the convictions for possession with intent to distribute narcotics were sufficiently supported by the evidence, considered Goldsmith's presence in the apartment and his proximity to the narcotics and drug paraphernalia, which he could plainly see. Under South Carolina

Law, a jury may properly infer knowledge from such circumstances. *See, State v. Foster*, 237 S.E.2d 589, 593 (1977). The state courts in this case, however, did not point to any evidence from which a jury could infer dominion or control. Nor do we find such requisite record evidence of that element of the state offense as would meet the *Jackson* standard.[2] Essentially, the government only proved Goldsmith's presence

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[2]It is true that possession of more than twenty-eight grams of marijuana or ten grains of cocaine establishes a prima facie case of intent to distribute. S.C. Code Ann. §44-53-370(d)(3). The quantity of marijuana present in the apartment more than satisfied this threshold requirement. Although the amount of cocaine recovered was less than the statutory minimum for establishing a prima facie case of intent to distribute, the jury could well have relied on Goldsmith's putative possession of the drug paraphernalia to infer that he had an intent to distribute cocaine. *See, State v. Adams*, 352 S.E.2d 483, 485 (S.C. 1987). Missing from the necessary and cumulative structure of proof, however, was the initial requirement for the proof of possession. Proof of possession, in turn, was dependent on proof of Goldsmith's dominion and control over the drugs or drug paraphernalia.

in the apartment and his awareness of the drugs. Under South Carolina law, the mere presence of a person in an area containing drugs, absent evidence of his dominion and control over them, is insufficient to prove his possession of the drugs. *State v. Tabory*, 196 S.E.2d 111, 113 (S.C. 2973). Again, even presence coupled with knowledge of the drugs is insufficient to sustain a possession conviction; the State must also prove dominion and control. *See, Kimbrell*, 362 S.E.2d at 632. Even if this were not state law, the due process protections of *Jackson*, in our view, would require the invalidation of convictions based solely on evidence of mere presence, as was established in this case.

Proof of dominion and control, of course, may include evidence that the accused controlled the premises where the drugs were found or that he had a special relationship with the owner or lessor of the

premises. *See State v. Brown*, 22 S.E.2d 674, 676 (S.C. 1976) (reversing possession conviction for insufficient evidence where defendant was a passenger in a car containing eight pounds of marijuana, but where State did not show that defendant had special relation with car's owner or its driver or that defendant exercised control over the car); *cf. State v. Hudson*, 284 S.E.2d 773, 775 (S.C. 2981) (holding that evidence of heroin, seized from apartment shared by the defendants, was sufficient to show control and possession). The South Carolina courts have also accepted other proof of dominion and control as sufficient to support a finding of possession. *See State v.Ellis*, 207 S.E.2d 408, 413 (S.C. 1974) (reversing possession conviction where appellant resided in apartment in which heroin sales occurred and was present during sales, but where State did not show that appellant participated in the sales or in

any other way exercised control); *cf. Kimbrell*, 362 S.E.2d at 631 (holding that evidence, which showed accomplice told defendant to watch cocaine while former went outside, was sufficient to support possession conviction). We have no doubt that such holdings comport with the *Jackson* standard.

In this case, however, the prosecution presented only an evidentiary picture of an accused sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered. The State did not identify the lessor or the lessee of the apartment. It did not identify the small child who was in the apartment, or the relationship between the child and any of the defendants. Further, the State failed to establish any connection among Goldsmith and his two co-defendants, or between the co-defendants. At best, the State's

evidence showed Goldsmith's presence in an unknown person's apartment and his knowledge of drugs and drug paraphernalia in the apartment.

It is true that Goldsmith was alone in the apartment, except for the presence of the small child, at the time of the officers' entry. No witness was able to say, however, who was in the apartment before the police entered or why Goldsmith was there. On officer testified that he only "presumed" that Goldsmith was inside before they entered, and another, when asked who was inside before the search began responded, "I can't say." There was no evidence that all the entrances of the apartment building were under observation. Both Cooper and Jordan were close to the building, and Goldsmith may have been waiting for either co-defendant, or both, to return from outside. The record evidence does not indicate whether Goldsmith had been

at the apartment on previous occasions or how he came to be there when he was arrested.[3] Moreover, Goldsmith did not attempt to hide or dispose of the drugs or to evade the police. The trial evidence simply did not demonstrate that Goldsmith was "alone" in a sense that would have allowed the jury to infer that he had the right to exercise dominion and control over the apartment or the contents of the apartment.

Because the trial evidence was constitutionally insufficient to support a finding that Goldsmith had dominion and control over the marijuana or the cocaine, we find that there was insufficient evidence to find that he had possession of either drug. Therefore, we reverse the two

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[3]On officer testified that the police "had information that Mr. and Mrs. Cooper would be present at the time" of the search, but the jury was properly told to disregard the statement. *See* discussion *infra* part II.

convictions for possession with intent to distribute.

Likewise, after viewing the evidence "in the light most favorable to the prosecution," we find the evidence insufficient to support the conspiracy convictions. *Jackson*, 443 U.S. at 319.

Conspiracy is defined under South Carolina law as "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." S.C. Code Ann. § 16-17-410. In order to convict a person of conspiracy, the State must first show the existence of a conspiracy. *State v. Hiott*, 276 S.E.2d 163, 166 (S.C. 1981). The Supreme Court of South Carolina has held "that a formal express agreement is not necessary to establish the conspiracy, and that it may be shown by circumstantial evidence and the conduct of the parties."

State v. Oliver, 267 S.E.2d 529, 530 (S.C. 1980). After the prosecution establishes the existence of a conspiracy, it need prove only a slight connection between the conspiracy and the defendant to convict him of knowing participation in the conspiracy. *State v. Sullivan*, 282 S.E.2d 838, 843 (S.C. 1981) (quoting *United States v. Dunn*, 564 F.2d 348, 357 (9th cir. 1977)).

The State here, however, presented no evidence, even circumstantial, to show the existence of a conspiracy. Even had there been one, there was no evidence to show Goldsmith's participation. It is true, as previously noted, that the jury could have inferred Goldsmith's knowledge of the drugs. A reasonable juror could have believed Goldsmith was a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps even an interloper. A conclusion, however, that Goldsmith was part of a conspiracy to

distribute marijuana or cocaine, requires bridging an evidentiary gap with rank speculation.

II

Goldsmith also asserted in his petition that his Sixth Amendment right to confront witnesses was violated when the State introduced hearsay evidence, and that the trial court erred in denying defendant's motion for a mistrial. Goldsmith complains that the entire trial was tainted when the state prosecutor asked a deputy, "[W]hy did y'all serve the search warrant that day?" and the officer responded, "We had information that Mr. Goldsmith and Mr. Cooper would be present at the time." Although the trial court sustained defense counsel's objection and instructed the jury to disregard the answer, Goldsmith contends that the officer's statement "left an indelible impression fixed in the jurors' minds that this could not be a case of mere

presence because the police had additional evidence tying Goldsmith to the apartment, to Cooper, and to an ongoing drug conspiracy."

We agree with the South Carolina Supreme court that the blatant attempt by the prosecutor to strengthen an obviously weak case was egregious constitutional error. We disagree, however, with its conclusion that the error was harmless.[4]

The presumption of cure by a court's instruction is overcome when there is an "overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)

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[4] In order to show that a constitutional error was not prejudicial, the State must prove that it is not harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

(quoting *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)); *Bruton v. United States*, 391 U.S. 123, 136 (1968)). Here the officer's answer was devastating to the defense. By telling the jury that the police knew Goldsmith would be at the apartment at a specific time, it supplied a missing link in the State's case. The jurors could then believe that Goldsmith was personally known to the police and was known to be connected with the apartment and the drug operation inside. The statement linked Goldsmith to Cooper, and intimated that the two somehow operated out of the apartment together. There was no longer the possibility that Goldsmith was the identified target of a police investigation and a confederate of Cooper. The statement was not harmless error with regard to the conspiracy convictions. The jury could have inferred from this testimony that a conspiracy

existed and that Goldsmith participated in it.

Nor was the statement harmless error with regard to the convictions for possession with intent to distribute narcotics. The officer's response allowed the jury to infer that Goldsmith had a special relationship with the apartment and with cooper, and therefore, that Goldsmith had the right to exercise dominion and control over the apartment and its contents. Evidence of dominion and control would have established the other missing link in the State's case, providing the crucial element of the offense of possession with intent to distribute narcotics. At best, the presentation of the deputy's testimony represented loose prosecution. At worst, it could be seen as an attempt to present through the back door what the State had failed, for whatever reason, to present through appropriate prosecutorial evidence.

III

The judgment of the district court is reversed and the case remanded for entry of an order granting the writ of habeas corpus.

NIEMEYER, Circuit Judge, dissenting:

Lewis D. Goldsmith was convicted by a South Carolina state jury of six counts - two counts each of possession of marijuana and cocaine, possession with intent to distribute, and conspiracy to distribute. On appeal, the South Carolina Supreme Court vacated the "simple possession" convictions as lesser included offenses and affirmed the convictions on the remaining courts. On this petition for a writ of habeas corpus, Goldsmith would now have us review his convictions again, principally because, he contends, the evidence was insufficient to support the convictions. As he stated in his petition:

> The state fail to prove that the Petitioner had any knowledge of the Drugs that was found at another Persons Home, and in

> looking at the Evidence in light most favorable to the State, there was not evidence that would allow the State to find the Petitioner guilty beyond a reasonable doubt.

Goldsmith has also complained about the jury's possible consideration of stricken testimony that he contends was prejudicial.

Considering Goldsmith's first argument, we begin by recognizing that two state courts have reviewed Goldsmith's convictions for sufficiency of the evidence and that our role is only to assure that South Carolina complied with federal constitutional requirements when convicting Goldsmith. *See Jackson v. Virginia*, 443 U.S. 307, 322-23 (1979). While the imposition of a sentence in the absence of substantial evidence of criminal conduct would deny Goldsmith due process, I submit that that was not the case here. We must carefully limit our review to the issue of constitutional sufficiency, scrupulously resisting any temptation to substitute our interpretation of the

evidence for that of the South Carolina jury. *See Wright v. West*, 112 S. Ct. 2482, 2492 (1992) ("In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.") (Thomas, J., plurality opinion).

The evidence supporting Goldsmith's conviction stems from the July 22, 1988, search of Timmy Cooper's apartment. There is no dispute that state law enforcement officers conducted that search properly. The search was pursuant to a valid warrant, and probable cause to believe illegal activities were occurring within the apartment was established by a "controlled buy" of illegal substances in the apartment earlier that day.

The only people in Cooper's apartment immediately before the search were Goldsmith and a small child. At the time of the search Goldsmith was found sitting at the

kitchen table. In front of him on the table were cocaine powder, drug paraphernalia, rolling papers, and a "tube straw" (explained by the officers to be a straw that had been cut down for use in inhaling cocaine). On the floor, "right beside" the table, were two large bags of marijuana. In addition to the drugs found in front of the defendant, officers seized additional cocaine and marijuana, aluminum foil packages with cocaine in them, scales, a plastic sup with marijuana seeds, a handgun and cash. Upon arresting Goldsmith, officers discovered he had $200 in cash hidden in his sock.

In addition to the substantial quantities of drugs and drug-related paraphernalia found, the events surrounding Goldsmith's arrest provided evidence that he was involved with Cooper. When law enforcement officers arrived before the search in the parking area at Cooper's

apartment dressed in "raid jackets" which identified them as sheriff's deputies, Cooper, who was then outside, ran to the back door of the apartment and "slammed the door back on [the officer's] arm as [the officer] was trying to go in." Cooper then ran into the living room where he was restrained. A woman, possibly the mother of the small child, was outside of the apartment when the officers arrived and remained outside during the search and arrests.

The only evidence presented at trial was that of the State. But in support of his petition for a writ of habeas corpus Goldsmith contended:

> Petitioners Position is that on the Morning of July 22, 1988, He did stop by the Home of One Timmy Cooper, the CO-Defendant in this Case, However *to the best of His Knowledge there was no drugs found out in the Opening that he Could see*, that at the time in Question, That the Petitioner was on Parole and that He had called over to the CO-Defendants Home, and made arrangements to barrow the amount

> of Money that was needed to make His Ends Meet . . . .

(Emphasis added). His contention that he did not see any drugs and was not therefore involved with any drugs is directly contradicted by the testimony of the several officers, all of whom saw cocaine on the table and two large bags of marijuana on the floor.

The critical issue in this case is whether there is sufficient evidence from which a jury could infer that Goldsmith was in possession of the drugs. Even if the jury found he was in possession only of the drugs at and about the table where he was seated, it could permissibly find both possession with intent to distribute and conspiracy. Next to the table and clearly visible were the two bags of marijuana, the smaller of which contained 113.4 grams (several ounces). Possession of one ounce of marijuana establishes a prima facie case under South Carolina law of intent to

distribute. *See* S.C. code § 44-53-370(d)(3) (1988) (amended 1990). While the amount of cocaine on the table at which Goldsmith was seated, .1 gram (1.54 grains), was not by itself sufficient to establish a prima facie case of intent to distribute, *see* S.C. Code § 44-53-370(d)(3) (possession of ten grains of cocaine establishes a prima facie case of intent to distribute), when drug paraphernalia are present, no particular amount of cocaine is necessary to support a finding of intent to distribute. *See State v. Adams*, 352 S.E.2d 483,485 (S.C. 1987). In this case, in addition to the drug paraphernalia on the table in front of Goldsmith, scales, packaging, and more cocaine were seized from the apartment. Evidence was also admitted that showed that the officers had made a controlled buy from the apartment earlier.

To find a conspiracy, a jury need not find an explicit agreement, but may infer an

agreement from circumstantial evidence and the parties' conduct. *See State v. Oliver*, 267 S.E.2d 529, 530 (S.C. 1980). The jury could have properly concluded that Cooper was involved in the drug operation, a finding necessary to support a conspiracy conviction. When Cooper recognized that law enforcement officials had arrived at the scene, he ran to the apartment in an effort to exclude them and thereby protect the drug activity inside. From all the circumstantial evidence, a rational jury could, and did, conclude that Goldsmith was involved in a conspiracy.

A finding of possession by Goldsmith therefore remains the crucial element. To establish possession under South Carolina law, the State must show both the power to control the drugs and the intent to control their disposition or use. In this case both may be inferred from the presence of drugs in front of Goldsmith on the table at which

only he was sitting. "Because actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element. Possession may be inferred from the circumstances." *State v. Kimbrell*, 362 S.E.2d 630, 631 (S.C. 1987) (citation omitted). Viewed in a light most favorable to the State, the evidence properly admitted in this case permits the jury to infer that Goldsmith, the only adult in the apartment, was in possession of at least the drugs at the table, if not all the drugs found throughout the apartment.

Rejecting the permissible inferences, the majority opinion has, in my judgment, failed to take the evidence in a light most favorable to the State and has concluded that, "because the trial evidence was constitutionally insufficient to support a finding that Goldsmith had dominion and

control over the marijuana or the cocaine" the convictions must be reversed. I respectfully disagree.

Goldsmith's second argument is that the failure of the judge to order a mistrial in addition to striking the hearsay testimony violated his Sixth Amendment rights. The trial court sustained defendant's objection to the questionable evidence and curatively instructed the jury. In considering the effect of evidence improperly introduced, we must look at it in context. In this case, the stricken evidence would have added little to the State's case. Because the evidence was otherwise adequate to support a conviction, I would conclude that the evidence improperly introduced - a single question and answer promptly followed by an objection and a curative instruction - did not deny Goldsmith due process. *See Greer v. Miller*, 483 U.S. 756, 766 (1987).

While the case presented against Goldsmith was not an overwhelming one, it was supported by sufficient evidence and did not violate his constitutional rights. I fear that in this case the Court has been led not to a constitutional review under the Fourteenth Amendment, but to a garden variety appellate review of the same issues raised before, and properly disposed of by, the South Carolina Supreme Court. *See State v. Goldsmith*, 392 S.E.2d 787 (S.C. 1990).

Because I would affirm the district court's denial of the writ, I respectfully dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lewis D. Goldsmith,

Petitioner-Appellant,

v.

S.R. Witkowski, Warden; State of South Carolina; Attorney General of South Carolina,

Respondents-Appellees.

No. 91-7578
CA-90-1852-6-K
Filed: January 7, 1993

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellees filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

APPENDIX B

Entered at the direction of Senior Judge Sprouse, with the concurrence of Judge Murnaghan. Judge Niemeyer dissents.

For the Court,

/s/ Bert M. Montague

CLERK